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No. _____

Supreme Court, U.S.
FILED

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CLERK

IN THE
Supreme Court of the United States

JANUARY TERM, 1983

UNITED TRANSPORTATION UNION,

Petitioner,

v.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,
NEW JERSEY RAIL OPERATIONS, INC.,

Respondents

and

CONSOLIDATED RAIL CORPORATION

Rule 19 Party

**PETITION FOR A WRIT OF CERTIORARI
TO THE SPECIAL COURT, REGIONAL RAIL
REORGANIZATION ACT OF 1973**

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QUESTION PRESENTED

Whether a state (New Jersey) commuter authority, the Federal Court below and a Presidential Emergency Board are bound by the clear prior right seniority preservation language of Congress contained in the Northeast Rail Service Act of 1981, or whether the federal and state agencies are free to establish a new railroad seniority system the effect of which is to deprive, unconstitutionally, all affirmative action women and minority hirees of their jobs?

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The petitioner, United Transportation Union (UTU), respectfully prays that a writ of certiorari issue to review the order of the Special Court, Regional Rail Reorganization Act of 1973 entered in this case on December 21, 1982. The judgment and opinion have not yet been rendered.

OPINION BELOW

The opinion of the Special Court, has not yet been rendered. It will be supplied in a supplemental appendix as App. A. The order below is App. B.

JURISDICTION

The judgment of the Special Court has not yet been rendered but will be supplied in a supplemental appendix as (App. C). This petition is governed by § 1152(b) of the Northeast Rail Service Act of 1981 (hereinafter NER-SA), which provides that judgment of the Special Court shall be reviewable only upon petition for a writ of certiorari to this Court to be filed not more than twenty (20) days after the entry of an *order* of the Special Court (App. D).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of NERSA, including pertinent amendments to the Rail Passenger Service Act (RPSA) and the Regional Rail Reorganization Act of 1973 (hereinafter 3R Act), are set forth in the Appendix at pp. 9a-11a. (App. E).

STATEMENT

Proceedings Below

In the past, Consolidated Rail Corporation (hereinafter Conrail), has provided commuter service to the New Jersey area under a subsidiary arrangement with the State of New Jersey as provided by Section 304 of the 3R Act. Pursuant to Section 1136 of NERSA, Conrail was legislated out of the commuter rail business. The commuter lines of Conrail throughout the United States will be taken over by Amtrak Commuter or local commuter authorities at the options of the states involved.

Petitioner, UTU, is a labor union which represents many of the operating crews of the trains presently oper-

ated by Conrail which trains are being taken over by New Jersey Rail Operations, Inc., (hereinafter NJT), pursuant to NERSA.

Respondent in this case is a subsidiary of the NJT which is a public corporation chartered pursuant to the laws of the State of New Jersey to provide commuter service in that state. NJT is a "commuter authority" as defined in Section 1135 (a)(3) of NERSA.

NERSA amended RPSA in order to provide for the orderly transfer of employees from Conrail to the new commuter authorities. This case involves Sections 503 through 510 which prescribe the method under which Conrail commuter employees are to be absorbed by Conrail's successors.

More particularly, this case involves the preservation of seniority rights of the UTU members as their employer changes from Conrail to NJT. Congress provided that the new employers should maintain the employees' prior seniority rights, Sec. 508 (c) (5)(7). Each of the governmental bodies below, i.e., NJT, Conrail, Referee Kasher, the Presidential Emergency Board and the 3-judge 1152(a) Court, have defied the Congressional directive and held that a new form of seniority shall prevail and that after January 1, 1983 prior right seniority will no longer apply.

Pursuant to Section 508(a) NJT, Conrail and the UTU attempted to negotiate a mutually satisfactory implementing agreement. By August 1, 1982 no such agreement had been reached. Section 508(d)(1) requires that, within five days, the parties select a neutral referee in the event that implementing agreement negotiations are not completed by August 1, 1982. The parties were also unable to select an arbitrator by August 6th. Accordingly, pursuant to Section 508(d), the National Mediation

Board appointed Mr. Kasher on September 7, 1982 to resolve all implementing agreement disputes. Referee Kasher entered his decision on October 15, 1982 (App. F, 12a-14a). He found that after January 1, 1983 there would no longer be a prior right seniority system. Rather, there would be a new form of seniority system. The UTU moved for clarification and reconsideration of that decision on October 20, 1982.

There being no Kasher reconsideration, the UTU filed its complaint in this case on November 12, 1982 raising objections to the Kasher award insofar as it established a new form of seniority and scrapped the prior right seniority system (App. G, 15a-16a) which had been mandated by Congress.

On December 1, 1982 the President's Emergency Board adopted the NJT presentation which contained the Kasher new form of seniority (App. H, 17a-19a).

On December 6, 1982 on motion to clarify and reconsider, Mr. Kasher reaffirmed his original decision and held that the old form of prior right seniority would no longer prevail, that although the employees would move over to NJT according to the old seniority system, once over there, a new form of seniority would be employed (App. I, 20a-21a).

On December 10, 1982, the UTU moved the court below for a preliminary injunction holding the seniority status quo, i.e., enjoining the scrapping of the prior right seniority system and enjoining the implementation of the Kasher new form of seniority system based solely upon date of hire.

On December 21, 1982 the Court below entered an order with decision to follow, denying the preliminary injunction and affirming the Kasher abolition of prior right seniority system.

FACTS

The facts are contained in the moving affidavit of UTU General Chairman Charles P. Jones (App. J, 22a to 30a) and the intervenor Suzanne Woodard (App. K, 31a-33a) and are not substantially disputed.

There are approximately 610 UTU employees operating the trains in New Jersey. These positions have been held by Conrail employees. On January 1, 1983 these positions became those of NJT. The legislated spin off of the New Jersey rail system from Conrail to NJT is completed.

The seniority system before the spin off was based on prior and prior prior right system rather than being based solely on the employee's date of hire. Prior right means that an employee has territorial seniority to the original railroad of employment.¹ Prior prior rights refer to an employee's territorial rights which existed through two mergers. e.g., a Conrail employee who had originally hired on the old Pennsylvania Railroad would be said to have prior prior rights to the old Pennsylvania Railroad territory and prior rights to the Penn Central territory.

An employee's prior and prior prior rights were well understood by the company, the unions and the personnel. With each merger over the past four decades these rights were protected by Congress and the negotiators.

¹ Conrail, formed on April 1, 1976 by Congressional merger of bankrupt railroads in the northeast corridor.

Congress in legislating the NERSA spin off specifically provided that the ". . . Commuter authority . . . shall, to the extent possible, preserve their prior seniority rights.", (508(c)(5)) and "ensure the retention of prior seniority on Conrail . . ." (508(c)(7)).

It could not be contended sensibly that it would be impossible or even difficult to let the 610 UTU positions continue their prior seniority as it was on December 31, 1982. The prior and prior prior right seniority system had continued through multiple mergers, it could continue through a spin off. The seniority status quo could have been maintained.

Referee Kasher thought a straight date of hire seniority system would be "better" and directed that after January 1, 1983 there would no longer be a prior right seniority system.

This bold directive of the referee in the face of the contrary Congressional directive that prior rights should be preserved was sanctioned by the court below in affirming the Kasher award. Continuing the flaunt of the Congressional directive, the President's Emergency Board recommended that prior rights end.

The consequences of abolition of the prior rights system were drastic and pointed out to the Court below in the affidavits of Charles Jones and Suzanne E. Woodard. Employees hired after February 18, 1965 would not make the Kasher list. All black and female employees hired pursuant to affirmative action programs would not be hired according to the Kasher seniority system. The new railroad employer would have an all male, practically all white, work force. The minority employees would preserve their jobs if the congressionally mandated prior right system were continued, but it was not.

REASONS FOR GRANTING THE WRIT

1. **The State, Presidential Emergency Board And The Judicial Contradiction Of A Simple Congressional Directive To Preserve Prior Seniority Rights Constitutes A Reviewable Conflict Between Governmental Agencies At The Highest Level And Portends Labor Strife Throughout The Railroad Labor Force Of The United States.**

The decision below is in direct conflict with a long line of decisions of this Court which hold that in all cases involving statutory construction, the starting point must be the language employed by the Congress. See, *American Tobacco Co. v. Patterson* — U.S. —, 71 L. Ed. 2d 337 (1979). It also conflicts with this Court's view that legislative purpose is expressed by the ordinary meaning of words used in a statute, and that the language used is ordinarily conclusive. *Consumer Products Safety Commission v. G.T.E. Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Richards v. United States*, 369 U.S. 1, 9 (1962). What the Court below did in this case at the urging of the State of New Jersey, was to ally itself with Referee Kasher and the Presidential Board so as to act as super-legislators and decide a different and "better" seniority system in direct contradiction to the Congressional directive to preserve the prior right seniority system of the UTU employees. This is clearly contrary to past holdings of this Court. *American Tobacco Co. v. Patterson*, *supra*, 71 L. Ed. 2d at 757, n.6; *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

The smooth transition from Conrail to the commuter authorities explicitly envisioned by the Congress in NERSA hangs in the balance. Unions cannot stand by and see seniority rights eroded in direct contradiction to the Congressional intent to preserve prior rights. The unions involved have read Congress' dictates, i.e. the . . . Commuter authority . . . shall, to the extent possible, preserve their seniority rights." (508(c)(5)).

After NERSA enactment, the Unions' prior rights were safe. Next the unions were met with the notice of the State of New Jersey that it did not intend to grant any prior rights; next, the Kasher decision denied prior right seniority protection; next the Presidential Board sided with the State of New Jersey, and, finally, the Court below affirmed the abolition of prior rights. To expect the union leadership, in the face of such high level governmental contradiction, to lead its enraged membership to a smooth transition is unrealistic.

The importance of the issue far exceeds the expected labor turmoil generated by the executive and judicial meddling in the prior right seniority area which Congress had specifically preserved. The issue involves the freedom of Congress, within the bounds of the Constitution, to legislate toward such ends as it chooses without interference from the Judiciary, the states or Presidential boards. This is particularly so given the intensive federal concern with railroads in general. See *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Such high level conflict between the three branches of the United States government and a state should be reviewed by this Court.

2. **The Implementation Of The New Kasher Seniority System And Elimination Of The Prior Right System By The Efforts And/Or Concurrence Of The State Of New Jersey, Presidential Emergency Board And The Court Below Will Result In *De Facto* Racial And Sexual Discrimination In Violation Of Title VII Of The Civil Rights Act Of 1964, 42 U.S.C. § 1981 and 1983, The Fifth, Thirteenth And Fourteenth Amendments To The U.S. Constitution.**

The affidavit of Charles Jones, Suzanne E. Woodard, Intervenor rule 24, Pleading (App. L, 34a) as well as the memorandum and argument before the Court below raised the racial and sexual discrimination issues. The failure of the Court below to follow the dictate of Congress to preserve prior rights resulted in the loss of jobs of the black, Hispanic and female employees hired pursuant to the affirmative action programs.²

Implementation of the new seniority system would leave a completely male work force and would eliminate virtually all of the minority employees hired pursuant to affirmative action programs. Of the minority men who will remain (only a few) they will be deprived of their prior seniority rights and will thereby stand at the bottom of the seniority list. For any and all seniority purposes they will be second class employees.

The abolition of prior rights results in state and federally induced *de facto* sexual and racial discrimination in violation of the Constitution and Civil Rights Act. Certiorari ought be granted.

² The proceeding below afforded no opportunity for proof or cross examination other than the presentation of affidavits and exhibits. The weighty issues presented to the three judge court below were finally decided on papers alone.

CONCLUSION

The decision below is in direct conflict with decisions of this Court that plain and unambiguous Congressional language must be given effect. It concerns the fundamental question of the freedom of Congress to state what it means free from judicial, state and Presidential Board interference. It concerns state, judicial and Presidential Board implementation of and/or concurrence in an unconstitutional seniority system. A writ of certiorari should issue to review the order, judgment and, if issued, the opinion of the Special Court.

Respectfully submitted,

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